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# Federal Court Positively Adopts a Federal Common Law Testimonial Privilege for Mediation: Is It Justified?

*Folb v. Motion Picture Industry Pension & Health Plans*<sup>1</sup>

## I. INTRODUCTION

Mediation is a popular means of alternative dispute resolution that has proliferated in recent years. Virtually every state has adopted some form of testimonial privilege to protect the confidentiality of private parties participating in mediation. The federal courts, however, have never adopted a mediation privilege protecting the confidentiality of mediation between private parties in federal court. Federal courts have relied on other evidentiary, procedural and contractual protections to ensure that communications articulated during mediation will not be used for purposes outside mediation proceedings. Finding these protections inadequate to insulate parties in private mediation proceedings from third party discovery, the United States District Court for the Central District of California affirmatively adopted, for the first time in federal court, a federal common law mediation privilege. This Casenote considers the adequacy of the justification provided by the court in adopting the mediation privilege under the federal common law, and whether, in light of countervailing public policy, the scope of the mediation privilege adopted is over broad.

## II. FACTS AND HOLDING

Scott Folb (“Folb”), former Administrative Director of the Motion Picture Industry Pension & Health Plans (“Plans”), brought suit against the Plans claiming that the Plans discriminated against him on the basis of gender when he was discharged for sexual harassment.<sup>2</sup> In support of his claim, Folb averred that his discharge for sexually harassing another employee, Vivian Vasquez (“Vasquez”), was a pretext to a retaliatory discharge for exposing alleged violations of fiduciary duties owed to the Plans by its Directors under the Employee Retirement Income Security Act (“ERISA”).<sup>3</sup> Folb claimed that in order to discharge him, the defendants allegedly relied on a complaint filed by Vasquez accusing Folb of sexual

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1. 16 F. Supp.2d 1164 (C.D. Cal. 1998).

2. *Id.* at 1166.

3. *Id.*

harassment.<sup>4</sup> After Vasquez allegedly filed her complaint, the Plans hired Deborah Saxe (“Saxe”), an outside attorney, to investigate Vasquez’ sexual harassment claim.<sup>5</sup>

In approximately February 1997, Vasquez and the Plans attended a formal mediation with a neutral mediator.<sup>6</sup> The parties attempted to settle Vasquez’ potential claims against the Plans arising out of Vasquez’ allegation that Folb had sexually harassed her.<sup>7</sup> This process produced a contract between Vasquez and the Plans wherein the parties agreed to maintain the confidentiality of the mediation and all statements made during the proceedings.<sup>8</sup> Prior to the mediation, counsel for Vasquez prepared a mediation brief, which was distributed to counsel for the Plans during the mediation, Lawrence Michaels (“Michaels”).<sup>9</sup> The parties did not reach an agreement during mediation, but reached an agreement during subsequent settlement negotiations.<sup>10</sup> At some point after settlement, Michaels provided Saxe, who did not participate in the Vasquez mediation, with an unauthorized copy of the mediation brief.<sup>11</sup> “Saxe refused to produce the mediation brief in response to Folb’s subpoena, asserting that the confidentiality of the brief [was] protected under Federal Rules of Evidence [“FRE”] 408 and California Evidence Code [“CEC”] section 1119.”<sup>12</sup> Likewise, Vasquez’ counsel also refused to produce the mediation brief or the documents relating to the settlement negotiations.<sup>13</sup>

At a hearing before the magistrate judge, “Folb sought to compel production of (1) the mediation brief; (2) the correspondence between Vasquez’ counsel and counsel for the Plans during the mediation or other settlement discussions; and (3) the notes to the file prepared by Vasquez’ counsel regarding settlement communications.”<sup>14</sup> Folb asserted that these documents are relevant to his argument in his pending wrongful termination claim that his discharge for sexual harassment was pretextual. Folb claimed that the Plans, in defense of Folb’s claim, will attempt to show that his discharge was for alleged sexual harassment in subsequent proceedings.<sup>15</sup> He posits, however, that the Plans may have asserted, during the Vasquez mediation, that Folb had not, in fact, sexually harassed Vasquez.<sup>16</sup> Folb sought access to the mediation and negotiation materials in order to show this potential inconsistency in the Plans’ position.

The magistrate judge entered an order denying Folb’s motion to compel production, upon which Folb filed timely objections.<sup>17</sup> Because Folb’s claims

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4. *Id.*

5. *Id.*

6. *Id.* at 1167.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

include both federal claims under ERISA and pendant state law claims, the magistrate court also denied Folb's motion to remand this action to state court.<sup>18</sup>

Despite the existence of a federal question in Folb's complaint arising out of ERISA, the magistrate judge's decision to deny the motion to compel the discovery of mediation materials was predicated upon a California state mediation privilege protecting the confidentiality of mediation procedures.<sup>19</sup> This decision was, in large part, owing to the lack of a substantiated mediation privilege under federal common law. The magistrate judge justified the use of a state common law privilege by relying on recent cases that suggest state law is used to guide development of federal law.<sup>20</sup> Accordingly, the magistrate judge held that although state law privileges do not govern in cases that present federal questions, California's mediation privilege, CEC section 1119, applies in this action as a matter of comity because it is consistent with federal interests.<sup>21</sup> The magistrate's holding applied to both confidential communications during mediation and those during subsequent settlement negotiations.<sup>22</sup>

On review of the magistrate judge's order, the United States District Court for the Central District of California found that because a federal question was at issue, the federal common law must be applied in accordance with a recent United States Supreme Court decision establishing the preeminence of the federal common law where a federal question is raised.<sup>23</sup> Therefore, the District Court held that the Magistrate Judge erred in applying a state mediation privilege where federal law governs.<sup>24</sup> But the court upheld, in part, the magistrates order denying Folb's motion to compel discovery of confidential mediation materials.<sup>25</sup> In affirming the order, the court positively recognized and adopted a new federal common law mediation privilege, which protected the confidentiality of all communications between Vasquez and the Plans that occurred prior to and during formal mediation.<sup>26</sup> The court, however, tailored the scope of the privilege to protect only those communications between the parties occurring in conjunction with the mediation session itself.<sup>27</sup> Accordingly, the court held that communications between the parties during the negotiation settlements subsequent to the formal mediation session, including communications first articulated during formal mediation, are not protected by the federal common law mediation privilege.<sup>28</sup>

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18. *Id.*

19. *Id.* at 1170.

20. *Id.*

21. *Id.*

22. *Id.* at 1167.

23. *Id.* at 1170. See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

24. *Folb*, 16 F. Supp.2d at 1170.

25. *Id.*

26. *Id.* at 1179-80.

27. *Id.* at 1180.

28. *Id.*

### III. LEGAL BACKGROUND

As a general rule, the public is entitled to every person's evidence and, therefore, testimonial privileges are disfavored.<sup>29</sup> Creation of a new privilege is based upon public policy considerations that justify an exception to the general rule.<sup>30</sup> Traditionally, privilege rules have been based on the policy of fostering certain relationships that society deems important enough to justify creating an exception to the "general rule disfavoring testimonial privileges."<sup>31</sup> For example, the attorney-client privilege encourages observance of the law and facilitates the maintenance of an effective adversarial system of justice; the spousal privilege protects the public interest in marital harmony; the doctor-patient and psychotherapist-patient privileges serve the public interest in providing appropriate physical and mental health care.<sup>32</sup> The mediation privilege, by contrast, is most accurately described as a privilege that protects desirable activities rather than relationships.<sup>33</sup> Despite this distinction, both courts and experts recognize the mediation privilege as a potential solution to the need to protect the confidentiality of mediation sessions in order to promote dispute resolution and its attendant benefits.

Due in part to the relatively recent proliferation of mediation as an alternative to formal litigation, the federal courts have not definitively adopted a federal common law mediation privilege.<sup>34</sup> Federal courts, however, have considered related issues and decided them in a way suggesting that the time is ripe for formal adoption of a federal common law privilege for mediation.

Notably, the Ninth Circuit upheld the revocation of a subpoena that would have required a Federal Mediation and Conciliation Service ("FMCS") mediator to testify as to the confidential communications articulated in a formal mediation session.<sup>35</sup> In that context, the court concluded that requiring a mediator to divulge information regarding mediation proceedings would impair or destroy the usefulness of the FMCS in future proceedings.<sup>36</sup> The spirit of this conclusion, however, has not yet been affirmatively endorsed in the context of communications made by parties during private mediation through the adoption of a federal common law privilege.<sup>37</sup> As a result, federal courts have been relegated to the use of state mediation privileges applied as a matter of comity in federal cases, as well as evidentiary rules and contractual principles to protect the confidentiality of mediation proceedings. The success of these protections is the subject of vigorous debate. The debate is inevitably reduced to whether there is a need for a formal mediation privilege in spite

29. *In re Grand Jury*, 103 F.3d 1140, 1149 (3d Cir. 1997). See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (1961).

30. *Folb*, 16 F. Supp.2d at 1171.

31. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

32. *Id.* at 11.

33. Note, *Making Sense of Rules of Privilege under the Structural (Il)logic of the Federal Rules of Evidence*, 105 HARV. L. REV. 1339, 1356 (1992).

34. *Folb*, 16 F. Supp.2d at 1171.

35. *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 52 (9th Cir. 1980).

36. *Id.* at 54.

37. *Folb*, 16 F. Supp.2d at 1171.

of these protections and whether that need is great enough to warrant adopting the privilege despite the general rule disfavoring testimonial privileges.

The proposition and development of a mediation privilege has evolved against the backdrop of the liberal rules of discovery found in the Federal Rules of Civil Procedure ("FRCP") and the countervailing evidentiary policy to protect settlement negotiations from admissibility contained in the Federal Rules of Evidence ("FRE"). With the increase in popularity of alternative dispute resolution procedures, these rules are implicated more and more outside the context of traditional discovery and formal adjudication. Some courts look to FRE 408 for protection from the broad discovery rules provided in FRCP 26 that make confidential communications in formal mediation fair game during discovery.<sup>38</sup>

FRCP 26(b) provides that "it is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>39</sup> FRE 408 provides that "evidence of conduct or statements made in compromise negotiations is not admissible."<sup>40</sup> The exclusion of settlement negotiation communications in evidence under FRE 408, however, only provides protection from the disclosure of information to the trier of fact, not from discovery by a third party.<sup>41</sup> Consequently, this protection, even as extended by some courts to apply to discovery of confidential negotiation settlements as a semi-privilege, does not have the full force of a federal common law privilege.<sup>42</sup>

Parties often agree to maintain the confidentiality of mediation proceedings by executing a formal contract providing that all communications articulated during mediation must remain confidential. Because the evidentiary law insists that the public, through the courts, is entitled to every persons evidence,<sup>43</sup> these contracts may not be enforceable as a matter of public policy.<sup>44</sup> The pursuit of justice cannot be restricted by agreements that deny courts access to the testimony of the parties to those agreements.<sup>45</sup> Mediation participants who rely on an agreement to maintain the confidentiality of mediation communications, do so at their own peril.

Courts are not limited to FRE 408 and antiquated contractual principles as the only authorities by which they may protect communications made pursuant to mediation procedures. Congress enacted FRE 501, which endows the federal courts with the authority to adopt new testimonial privileges governed by the principles of

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38. See, e.g., *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72, 76, 79 (S.D. W. Va. 1996).

39. *Id.* at 76 (quoting *Botaro v. Hatton Assoc.*, 96 F.R.D. 158, 159 (E.D.N.Y. 1982)).

40. FED. R. EVID. 408.

41. *Folb*, 16 F. Supp.2d at 1171.

42. *Young*, 169 F.R.D. at 79 (holding that the weight of authority and FRCP 26(b) impose greater burden to establish relevancy to gain discovery of inadmissible, non-privileged confidential settlement documents).

43. WIGMORE, *supra* note 29, § 2192, at 70. See Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 10, 11 (1995).

44. WIGMORE, *supra* note 29, § 2194b, at 77.

45. *Id.*

the common law interpreted in light of reason and experience.<sup>46</sup> FRE 501 made it possible for there to exist both a state and federal testimonial privilege in corresponding state and federal jurisdictions.

The United States Supreme Court, in *Jaffee v. Redmond*,<sup>47</sup> declared that federal privilege law is the exclusive law applicable in cases where there is a federal question presented, as in the instant case.<sup>48</sup> Thus, state mediation privileges may not be applied in federal court as a matter of comity. Federal courts, then, must act pursuant to FRE 501 if they seek to protect communications articulated in mediation through a testimonial privilege.

The business of establishing new testimonial privileges is necessarily a deliberate process. The *Jaffee* Court, based on the authority of FRE 501, stated that for a testimonial privilege to be justified as an exception to the general rule, the privilege must protect a "public good transcending the normally predominant principle of utilizing all rational means of ascertaining the truth."<sup>49</sup> The Court established the following test to determine whether an asserted privilege constitutes such a public good, in light of reason and experience: the court must consider (1) whether the asserted privilege is "rooted in the imperative need for confidence and trust"; (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.<sup>50</sup> In espousing such a test and adopting a federal common law privilege for psychotherapist-patient relationships in accordance with this test, the *Jaffee* Court has invited other federal courts to adopt common law privileges which meet the test's high threshold.

Commentators are divided as to whether a mediation privilege is necessary for successful mediation. Alan Kirtley suggests that a mediation privilege is necessary because it facilitates open communication between parties to a dispute.<sup>51</sup> He argues that without adequate legal protection, "a party's candor in mediation might well be 'rewarded' by a discovery request or the revelation of mediation information at trial."<sup>52</sup> Kirtley opines that "[a] principle purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation."<sup>53</sup>

46. FRE 501 provides:

Except as otherwise required by the Constitution of the United States or Provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

See *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996).

47. *Jaffee*, 518 U.S. at 14-15.

48. *Id.*

49. *Trammel v. United States*, 445 U.S. 40, 50 (1980).

50. *Jaffee*, 518 U.S. at 9-13.

51. Kirtley, *supra* note 43, at 8, 16.

52. *Id.* at 9-10.

53. *Id.* at 10.

Other commentators oppose the idea that mediation has a need for a mediation privilege to protect confidentiality in mediation.<sup>54</sup> Eric Green argues that a campaign to obtain a blanket mediation privilege rests on “faulty logic, inadequate data, and short-sighted professional self-interest.”<sup>55</sup> Another author takes the position that, while a certain level of confidentiality may be necessary to make mediation effective, “it is wrong to assume that mediation needs absolute confidentiality.”<sup>56</sup>

Undoubtedly, most courts agree (especially those with mandatory mediation programs) that confidentiality in mediation is important to the process because it allows participants to rely on the confidential treatment of everything that transpires in formal mediation, thereby facilitating communication between the parties and increasing the success of mediation as an alternative means of dispute resolution. However, the real debate is over whether confidentiality of communications during mediation rises to the level of a “public policy transcending the normally predominant principle of utilizing all rational means of ascertaining the truth.” The United States District Court for the Central District of California answered this question affirmatively.

#### IV. INSTANT DECISION

In the first instance, the court concluded that the magistrate judge erred as a matter of law in applying the California mediation privilege “as a matter of comity.”<sup>57</sup> The court found that the magistrate judge was not free to apply state law where the claim presents a federal question even though the reasoning of a state privilege may run parallel to the elements of the test set forth in *Jaffee*.<sup>58</sup> The court stated: “the federal courts are bound to strictly apply that test [*Jaffee* test] in adopting a new federal privilege and may not conduct a more ad hoc analysis of the relationship between the experience of the forum state and various federal interests.”<sup>59</sup> Indeed, the court held that “to the extent the authority relied upon by the magistrate judge that suggests federal courts should look to the law of the forum state as a matter of comity in determining the contours of federal privilege law, that authority is disapproved of by *Jaffee*.”<sup>60</sup>

This conclusion, the court found, is equally applicable in federal question claims where pendant state law claims are raised, as in the instant decision.<sup>61</sup> The court endorsed the position of leading commentators that suggest that in such cases, the

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54. Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 32 (1986).

55. *Id.* at 2.

56. Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 26 (1992).

57. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp.2d 1164, 1170 (C.D. Cal. 1998).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1169.



federal common law should govern all claims of privilege raised in the litigation.<sup>62</sup> The experience of states that have adopted state mediation privileges was not lost on the court, however. Thus, while the court rejected the state mediation privilege under which the magistrate judge denied Folb's motion to compel discovery of mediation communications, the court sustained the order by adopting, for the first time in federal court, a federal common law mediation privilege pursuant to the test espoused in *Jaffee*.<sup>63</sup>

First, the court found that there was a need for confidence and trust in formal mediation sessions.<sup>64</sup> The court was persuaded by the sway of authority which conclude that the need for confidentiality and trust between participants in a mediation proceeding is sufficiently imperative to necessitate the creation of some form of privilege.<sup>65</sup> The court noted, as one source of authority, the existence of alternative dispute resolution programs created by court rule, some of which are a mandatory step in the litigation process.<sup>66</sup> Specifically, the Central District of California's Local Rule 23 requires parties in every civil case to participate in one of the approved settlement procedures.<sup>67</sup> The Local Rule provides that "[a]ll settlement proceedings shall be confidential. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement and the Clerk's minutes of the proceedings."<sup>68</sup> This provision, the court found, indicates that the confidentiality of mediation proceedings is necessary to facilitate open communication between parties, and to prevent adversarial posturing in anticipation of the possibility that communications articulated during mediation might be used against them in subsequent litigation.<sup>69</sup> However, even if read broadly, this provision would not protect mediation communications from third parties seeking this information during discovery conducted pursuant to a different lawsuit. The broad federal discovery rules make these communications susceptible to adversarial discovery from a third party despite the precautions taken by the parties to the mediation to maintain the confidentiality of the proceedings. For this reason, the court concluded that a blanket federal common law mediation privilege should be adopted.<sup>70</sup>

In support of their conclusion, the court noted that Congress is currently considering an "ADR Bill"<sup>71</sup> which would provide that each district court shall, by local rule adopted under section 207(b), prohibit disclosure of confidential dispute resolution communications.<sup>72</sup> Although this is further evidence of the important public interest in protecting confidential communications in court-ordered mediation, the court determined that in practice it would suffer from the same infirmity as Local

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62. *Id.* (citing 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[2][c] (Joseph M. McLaughlin ed., 2d ed. 1997)).

63. *Id.* at 1179-80.

64. *Id.* at 1171.

65. *Id.* at 1175.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1176.

71. Alternative Dispute Resolution Act of 1998, H.R. 3528, 105th Cong. (1998).

72. *Folb*, 16 F. Supp.2d at 1175.

Rule 23.<sup>73</sup> Namely, mediation participants will not be protected from third parties seeking discovery of information disclosed during the course of mediation proceedings.<sup>74</sup> A federal common law mediation privilege would protect the parties from third party discovery. The court, therefore, found that a federal common law mediation privilege is rooted in the imperative need for confidence required by the first prong of the *Jaffee* test.<sup>75</sup>

The court next addressed whether a mediation privilege would serve public ends.<sup>76</sup> Because a mediation privilege promotes a desirable activity rather than a protected relationship there is a question as to whether the privilege serves a public good that is sufficiently important to justify creating an exception to the general rule disfavoring testimonial privileges.<sup>77</sup> In deciding this question, the court addressed a challenge to a blanket mediation privilege whose author proposes that because the value of a mediation privilege is its ability to promote dispute resolution rather than its ability to foster ongoing interpersonal relationships, the need for confidentiality in mediation is of a lesser order.<sup>78</sup> The court criticized this challenge as adhering to a model that is overly rigid in its characterization of the mediation privilege as a second order public interest not deserving of a blanket privilege.<sup>79</sup> The court proposed that if the purpose of a mediation privilege is to foster forthright communication between parties to a dispute, rather than to protect only those communications made during private sessions with the mediator, a mediation privilege would fall squarely within the "relational" privileges category the opponent of a blanket mediation privilege would protect.<sup>80</sup> The court summarily rejected the opponent's challenge.

Others critique a blanket mediation privilege on the grounds that it subverts the public policy that promotes holding wrong-doers publically accountable for their actions in a public trial and the attendant precedent established therefrom.<sup>81</sup> The court disagreed and responded with a measure of pragmatism by noting that "[a] privilege that promotes conciliatory dispute resolution and alleviates the press of cases on the formal judicial system also allows the courts to devote those limited resources to fairly adjudicating those cases that do result in protracted litigation."<sup>82</sup> Accordingly, the court concluded that a mediation privilege would serve important public ends by promoting conciliatory relationships among parties to a dispute, thereby satisfying the second element of *Jaffee*.<sup>83</sup>

The third element of the *Jaffee* test is whether the evidentiary detriment caused by exercise of the privilege is modest.<sup>84</sup> The evidentiary benefit of allowing discovery of mediation communications is to access evidence like admissions of

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73. *Id.* at 1176.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* See Note, *supra* note 33, at 1357.

79. *Folb*, 16 F. Supp.2d at 1176.

80. *Id.* at 1177.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996).

party opponents. The court concluded, consistent with the Supreme Court in *Jaffee*, that this evidence is unlikely to ever come into being if the privilege did not exist and, therefore, there is a modest evidentiary detriment associated with a mediation privilege. Moreover, the court opined that the evidence protected by a mediation privilege could, theoretically, be elicited in response to a request for admission or to questions in a deposition or in written interrogatories.<sup>85</sup>

Finally, the court considered the fourth element of the *Jaffee* test, whether denial of the federal privilege would frustrate a parallel privilege adopted by the states. As the Supreme Court stated in *Jaffee* "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one."<sup>86</sup> The court noted that every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another.<sup>87</sup> A majority of the states go beyond protecting communications in private sessions with the mediator, requiring that the entire process be confidential, although, some do not accord mediation such broad protection.<sup>88</sup> Despite the disparity among the states regarding the scope of their respective privileges, the court found that such should not prevent the adoption of a federal common law privilege. The court recognized that a mediation privilege, while repugnant to other public policies, is justified in light of reason and experience.<sup>89</sup> Accordingly, the court found that there is ample support among the states to adopt a federal mediation privilege applicable to all communications made in conjunction with formal mediation proceedings.<sup>90</sup>

Having affirmatively adopted the privilege pursuant to FRE 501, the court proceeded to define its contours. The court's primary focus settled on the certainty of the privilege regarding whether it would protect communications made during the broad settlement process of which mediation is a part.<sup>91</sup> It noted that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>92</sup> Therefore, the mediation privilege adopted was held to apply only to information disclosed in conjunction with mediation proceedings with a neutral mediator.<sup>93</sup> This includes communications between parties in preparation for and during the mediation proceedings, a seemingly bright line rule.<sup>94</sup> Subsequent negotiations between the parties, even if they include information initially disclosed in the mediation do not fall within the scope of the privilege.<sup>95</sup> Applying the privilege to the facts of the instant case, the court held that all communications between the Plans and Vasquez

85. *Folb*, 16 F. Supp.2d at 1178.

86. *Jaffee*, 518 U.S. at 12-13.

87. *Folb*, 16 F. Supp.2d at 1179.

88. *Id.* (quoting Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 757 app. (1997)).

89. *Id.*

90. *Id.* at 1179-80.

91. *Id.* at 1180.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

in preparation for and during mediation fell within the ambit of the privilege; therefore, disclosure may not be compelled by Folb's third party discovery motion.<sup>96</sup> However, the court also held that Folb may seek to compel production of any documents relating to communications between Vasquez and the Plans that were not made in conjunction with, or pursuant to, the formal mediation proceeding.<sup>97</sup>

## V. COMMENT

Mediation has become a popular means of settling disputes. Disputants choose mediation to avoid the rigors of protracted litigation, saving the courts, both state and federal, valuable time and effort. Indeed, some courts require litigants to participate in some form of alternative dispute resolution procedure before proceeding in formal litigation.<sup>98</sup> As an alternative dispute resolution mechanism, mediation is far more conducive to amicable settlement than the adversarial litigation process, and may allow parties to settle their differences without unnecessarily escalating the dispute. Mediation's success as a vehicle for settlement owes much of that success to these virtues. However, parties seeking the benefits of mediation do so predicated upon the assumption that participation in the mediation process will not expose them to the very risks they seek to avoid in formal litigation. Mediation participants' behavior during the procedure is, in large part, dictated by the belief that what they communicate will be held in confidence. Confidentiality, therefore, is at once itself a virtue of the mediation process and a protection against disclosure of information for other purposes including subsequent litigation.

As proponents of mediation have long contended, successful functioning of mediation is dependent upon the confidentiality of mediation proceedings.<sup>99</sup> "Confidential," however, may have different meanings depending on context and the applicable law. In adopting a federal common law mediation privilege, the United States District Court for the Central District of California established the nature, scope and exclusivity of the federal privilege. In so doing, it took an important step in giving effect in federal court to the policy protecting the confidentiality of mediation already implemented in some form or another by virtually every state.<sup>100</sup> However, not all agree that a federal common law mediation privilege is necessary to protect and promote mediation as an alternative to formal adjudication.

Scholars disagree as to whether there is a true need for a federal common law mediation privilege at all, and even those that do recognize a need for some protection do not agree that the need is sufficiently great to pass the test the Supreme Court established for the creation of federal common law privileges pursuant to FRE 501.<sup>101</sup> Moreover, even if it is assumed that a federal mediation privilege can be

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96. *Id.*

97. *Id.*

98. *Id.* at 1175.

99. Kirtley, *supra* note 43, at 1.

100. *Folb*, 16 F. Supp.2d at 1181.

101. Compare NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 145-46 (1989); NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 67-71 (1987); Gibson, *supra* note 56, at 25; Green, *supra* note 54, at 1; Kirtley, *supra* note 43, at 1.

justified in light of the *Jaffee* test, the scope of the privilege established in *Folb* is broad, perhaps too broad. With the scholarly debate and the current position of the states in mind, the Central District of California established a federal common law mediation privilege for the first time in federal court. Unfortunately, the court failed to support the privilege with reasoning that provides a solid foundation for why the adoption of the privilege was prudent in light of reasoning and experience.

Given that testimonial privileges are strongly disfavored, the court set out to justify the establishment of the privilege within the framework of the *Jaffee* test, but finessed several of the conceptual underpinnings of the elements of that test. The overriding standard that the elements of the *Jaffee* test are calculated to determine is whether a privilege is a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.<sup>102</sup> The court argued that because the Supreme Court determined that federal law alone applied where a federal question was raised and that current protections were insufficient to provide disputants adequate protection from third parties seeking discovery of communication made pursuant to mediation proceedings, there was an imperative need for the privilege. The determination of need forms the backbone of the court's opinion, but the court fails to explain why this need elevates the public policy favoring the privilege to a policy that transcends the normally predominant principle of utilizing all rational means of ascertaining the truth. While the court considered the elements of the four prong test that must be used to decide whether the standard has been met, the court failed to address each element with the ultimate standard in mind.

A core assumption the court made is that the mediation procedure and the need for confidentiality to foster its success, is greater than the need of a third party to employ the broad federal discovery rules<sup>103</sup> in order to discover information which may lead to admissible evidence. That is, the effect of confidentiality between two private parties in a mediation should extend beyond those parties to protect them from what may be a legitimate suit brought against a party in mediation by a third party. To say that confidentiality in mediation promotes open communication between the parties to a mediation is plausible, and may be "rooted in the imperative need for confidence and trust."<sup>104</sup> But this determination does not alone establish that the privilege constitutes a public good that should be adopted in light of reason and experience. The court appeared to treat the need for confidentiality in mediation, the first element of the *Jaffee* test, as sufficient in and of itself to elevate a mediation privilege to a "public good transcending the normally predominant principle of utilizing all rational means of ascertaining the truth."<sup>105</sup> The court's determination that there was a need for confidentiality to promote the success of mediation created a momentum for the court towards the ultimate result. The court seemed to ride this momentum past the logical justifications for the mediation privilege directly to its

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102. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))).

103. See *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72 (S.D. W. Va. 1996).

104. *Folb*, 16 F. Supp.2d at 1176.

105. *Jaffee*, 518 U.S. at 9.

holding: adoption of the privilege. The result oriented approach helps explain the court's inadequate treatment of the other elements of the *Jaffee* test.

The court's consideration of the second and third elements of the *Jaffee* test bears out this deficiency. The court acknowledges that the Supreme Court requires that a new privilege must serve a public good sufficiently important to justify creating an exception to the "general rule disfavoring testimonial privileges."<sup>106</sup> The public interest promoted by a blanket mediation privilege would encourage "prompt, consensual resolution of disputes, minimizing the social and individual costs of litigation, and markedly reducing the size of state and federal court dockets."<sup>107</sup> However, the court never affirmatively addresses why the privilege is important enough to justify an exception to the general rule disfavoring testimonial privileges. Instead, to promote the public policy favoring a mediation privilege, the court focused on the characterization of a privilege in relation to other common law privileges adopted by federal courts. In doing so, the court assumed a defensive posture, arguing against distinctions made by "academics" between other common law privileges protecting interpersonal relationships and the mediation privilege, which protects a beneficial activity. It concluded that the mediation process can be characterized as "relational" and, therefore, it is deserving of a testimonial privilege. However, it never developed, nor explained the policy that stated why the participants in mediation, engaged in a beneficial activity, should not be accorded the benefit of a testimonial privilege.

The court also acknowledged that another critique of the public policy favoring a mediation privilege had merit, but again failed to positively answer the critics. Namely, some critics contend that settlement through ADR procedures deprives society of the precedent that is created when a party is brought to justice within our formal system of litigation. The court responded with an argument based on the need to allocate limited judicial resources to those disputes that do not settle voluntarily. While judicial economy is an important reason to support ADR procedures generally, it does not directly address why a testimonial privilege is so important to the mediation process that it is justified in light of our rule disfavoring testimonial privileges.

Likewise, the court finessed the third element of the *Jaffee* test: "whether the likely evidentiary benefit that would result from the denial of the privilege is modest."<sup>108</sup> In determining that there would be a modest evidentiary benefit, the court found that without the mediation privilege parties would presumably not attend mediation. An inconsistent position a party to mediation might take during subsequent litigation, as is alleged by Folb, would therefore never "come to light." The court borrowed this analysis from the Supreme Court in *Jaffee*, where that Court found that without a testimonial privilege for psychotherapist-patient relationships communication between psychotherapist and patient would be chilled and, therefore, there would be no evidence to discover.<sup>109</sup> However, this analysis is inapposite in the context of mediation as the very case in which the court employs this analysis

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106. *Folb*, 16 F. Supp.2d at 1176.

107. *Id.*

108. *Jaffee*, 518 U.S. at 2.

109. *Id.* at 11-12.

demonstrates. The Plans participated in mediation without a mediation privilege which gave rise to Folb's motion to discover the same evidence that the court claims would never be produced without a mediation privilege! In actuality, the evidentiary detriment is potentially severe. Depending on the scope of the privilege, third parties seeking discovery of information communicated in conjunction with a mediation may be denied information that would yield admissible evidence that the third party could obtain no where else. Even if the court's conclusion is correct, that the importance of confidentiality in mediation is important enough to warrant sacrificing otherwise discoverable information by third parties, the court has failed to provide a compelling argument for this conclusion within the framework of the standard set by the Supreme Court for the adoption of common law testimonial privileges pursuant to FRE 501.

Perhaps the most remarkable feature of the District Court's opinion is its recognition of the need for a *blanket* mediation privilege. Not only did the court adopt a federal mediation privilege for the first time, but it provided that any communications made "in conjunction with mediation," whether before or during the actual mediation proceedings fell within the purview of the privilege's protection.<sup>110</sup> The privilege does not include information communicated after mediation is complete even if the information was first articulated in conjunction with the mediation proceedings. In this way the court establishes a bright line rule, but the scope of the rule may sweep too broadly. The justification for the privilege as an exception to the rule disfavoring testimonial privileges becomes more attenuated when the communications protected are not articulated during the mediation session itself. It is true that if the privilege did not protect materials made in anticipation of a mediation (the mediation brief in the instant case) these materials might not be produced, which could undermine the success of the mediation. But the broad scope of the privilege might also provide unscrupulous parties an incentive to characterize all communications relating to a dispute as "in conjunction with" a future mediation so as to shelter sensitive information that may be relevant to a third party's suit against the party to mediation. Because this federal mediation privilege is the first of its kind it remains to be seen how it will affect mediation proceedings and whether other federal courts will follow the lead of the United States District Court for the Central District of California in adopting a testimonial mediation privilege.

## VI. CONCLUSION

Confidentiality in mediation is important for the success of the procedure. Following the trend of state courts, the United States District Court for the Central District of California established the first federal common law mediation privilege pursuant to FRE 501. It facilitates open communication between the parties producing settlements which might otherwise result in protracted litigation. However, the court's reasoning in support of the privilege fell short of a convincing argument. While the justification for the privilege may indeed exist, the court failed

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110. *Folb*, 16 F. Supp.2d at 1181.

to provide an adequate treatment of the factors the Supreme Court has established to determine whether a privilege should be adopted. The opinion will provide opponents of the privilege an opportunity to attack the court's reasoning and the justification for the privilege. Hopefully, the deficiencies in this court's reasoning and the criticism it will incite will not postpone other federal courts from adopting a federal common law mediation privilege which is justified in light of reason and experience.

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